ORIGINAL FILE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

Comments of

CONTINENTAL CABLEVISION, INC.

Robert J. Sachs
Senior Vice President
Howard B. Homonoff
Director, Corporate and
Legal Affairs
Continental Cablevision
Pilot House, Lewis Wharf
Boston, Massachusetts 02110
(617) 742-9500

Frank W. Lloyd
Keith A. Barritt
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

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SUMMARY

Continental Cablevision, Inc. ("Continental"), the third largest U.S. cable system operator, asks the FCC to fashion rules that address practical concerns for both consumers and cable operators raised by its proposed broadcast signal carriage rules. The touchstone of the FCC's approach in this complex area should be flexibility, to avoid unintended consequences.

The FCC, for example, has asked for comment on the designation of a cable system's "principal headend" for noncommercial stations' must-carry purposes. Rules that fail to provide cable operators with sufficient flexibility in making this designation could greatly inhibit Continental's and other cable operators' current deployment of fiber optics to replace headends where possible, in an effort to improve signal quality, reliability, and capacity.

In defining a cable system's market for purposes of commercial stations' must-carry, the FCC should consider the entire geographic area served by the system, rather than solely the location of the principal headend. This would avoid bizarre situations such as in Continental's systems serving communities in north central Connecticut, where nearby Hartford broadcast signals would under a rigid ADI interpretation be treated as distant merely because the system's principal headend is located in Massachusetts.

The FCC has the authority to add communities to or subtract them from a station's television market. Over-the-air viewability is a key factor to be considered. Preference should also be given to keeping communities in the same television

market as in-state broadcast stations. Communities more than 50 miles from a broadcast station should generally not be deemed to be within that station's market. Where a community may be included in multiple ADIs, the operator should be able to choose those ADIs in which it wishes to be included.

The 1992 Cable Act does not specifically include or exclude regional distant stations as entitled to exert retransmission consent rights. Because these stations are excluded from the Act's must-carry regime, and to serve the public interest of consumers who rely on them, the FCC should rule that they are similarly excluded from exerting retransmission consent rights. The Act's legislative history, stressing retransmission rights of "local" stations entitled to elect must-carry, supports this interpretation.

Noncommercial stations should be deemed to be "substantially duplicated" for must-carry purposes when over 50 percent of the programming content is the same, whenever aired during the week. Commercial stations should be deemed "substantially duplicated" when over 50 percent of their prime time programming is the same.

The FCC should exclude from the requirement that must-carry signals be viewable on all subscriber sets those situations where signal quality is degraded due to a broadcaster's insistence on a particular channel position, or where commercial entities have contracted for a different channel line-up.

Cable operators should also be empowered to flexibly resolve channel positioning disputes, to protect signal quality and minimize theft of service. If the FCC establishes a specific priority it should go to a station that has most recently been on

the channel. Pre-existing contracts between cable operators and cable network programmers or other stations entered into prior to the enactment of the 1992 Cable Act should be grandfathered for their current terms, or, at a minimum, the FCC should rule that no contractual liability will result from relocating existing program services.

Flexibility should be the hallmark of engineering disputes as well. The FCC should consider the technical components of typical cable headends in defining what constitutes the "input terminals of the signal processing equipment" for must-carry purposes. The FCC should not require operators to incur costs for the alteration of their existing facilities to accommodate reception of over-the-air signals. Cable operators should not be liable for the deletion of any material in the vertical blanking interval, nor for any interference induced into the signal prior to its reception by the operator.

The retransmission consent provisions of the 1992 Cable Act should also be pragmatically interpreted, to be consistent with the copyright laws. A copyright holder should not be permitted to impede a station's grant of retransmission consent to a cable operator. The compulsory license already gives the operator the right to carry the programming carried by the station. Broadcast stations should be required to make their initial election between must-carry and retransmission consent by June 1, 1993, and subsequent three-year elections should be made by April 1, to avoid unnecessary copyright fees from carriage of a broadcast station for a portion of a copyright royalty reporting period.

TABLE OF CONTENTS

Before the
Federal Communications Commission
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In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
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Comments of

CONTINENTAL CABLEVISION, INC.

Introduction

Continental Cablevision, Inc., founded in 1963, is the third largest cable system operator in the United States. Continental serves almost 2.9 million cable subscribers or roughly 5.5% of U.S. cable television households. These subscribers are located in 600 communities in 16 states.

Continental believes that the manner in which its cable systems would be affected by the Commission's broadcast signal carriage rules that the FCC will adopt in this proceeding are typical of those that would be encountered by other large, regionally diverse, cable operators. Continental is, for example, widely deploying fiber optic technology in an effort to improve signal quality and system reliability while increasing channel capacity. Ironically, this effort could be perversely affected if the FCC makes the wrong choice in adopting its definition of a "principal headend."

Continental, moreover, has many geographically extended systems that cross multiple ADIs. Its systems will thus be

dramatically affected by how the FCC defines a cable operator's local market for must-carry purposes.

Continental also has extensive experience with the importation of regional distant signals to its customers, an area that Continental believes is not meant to be affected by the 1992 Cable Act[1/] but which could be adversely affected, to the public's detriment, depending upon the course of action taken by the Commission in this proceeding.

Based on its engineering expertise, Continental offers a number of suggestions in the technical areas requested by the Commission. Continental's practical experience should also assist the Commission as it fashions rules in the areas of signal viewability and channel repositioning.

Finally, Continental offers suggestions on how the FCC should view the relationship between the rights of broadcasters and the rights of copyright holders, and establish the dates for broadcaster elections, in the area of retransmission consent.

Continental has not attempted to respond to every question the Commission has asked in this docket. Continental understands that the national cable trade associations, NCTA and CATA, will cover these issues in a more comprehensive manner. Continental has focused upon those issues about which it believes it has particular knowledge or experience, or a unique viewpoint, that may assist the Commission. To further assist the FCC,

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[1/] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 ("1992 Cable Act" or "the Act").

Continental has appended to these comments proposed rules that would implement its suggestions.

Must Carry Rules

1. The FCC Should Adopt A Flexible Approach In Defining Those Noncommercial And Commercial Stations That Qualify For Carriage Under The Must-Carry Rules

(a) Definition of "Principal Headend" for Measuring Carriage Rights Of Noncommercial Stations

The 1992 Cable Act states that a qualified noncommercial station is "local" and must be carried if its "reference point" is within 50 miles of a system's principal headend or if it places a Grade B contour over the system's "principal headend."[2/] The FCC proposes that an operator can choose the "principal headend" so long as the choice is not made to avert the must-carry rules. We strongly endorse that viewpoint. But the FCC asks for assistance in determining under what circumstances an operator should be permitted to change this designated headend.[3/]

Continental believes that the cable operator must retain total flexibility to make business decisions in this area. It is not uncommon for cable operators to change the location of a headend to improve the signal quality delivered to the customer. The change may be necessitated by a variety of technical factors,

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[2/] See Section 615(l)(2) of the 1992 Cable Act.

[3/] Notice of Proposed Rule Making, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-259 (rel. Nov. 19, 1992) at ¶ 8 (hereinafter "NPRM").

such as electrical interference at one site, or too-close proximity to a broadcaster's transmission tower at another.

The FCC's rules also should reflect the technical and business trend to eliminate cable headends and carry signals longer distances with fiber optic trunks. The FCC should encourage the cable industry to upgrade its infrastructure through such investment in fiber optics. The rules should not hinder the deployment of fiber by Continental and other cable operators by imposing phantom headend requirements that would discourage fiber investment.

In a number of Continental's operating regions, including the Ohio, New England and Western New England regions, our cable systems are in the process of consolidating or planning to consolidate headends and deliver signals longer distances through fiber. This benefits consumers in many ways, including reducing the number of amplifiers between the headend and the customer, which lowers operating and maintenance costs. Reducing amplifiers has already cut cable service outages by more than 25 percent. Customers also receive clearer pictures. The fiber trunk permits us to upgrade channel capacity without replacement of the wire to the home.

It is implausible that a cable operator would go to the great trouble and expense of moving a headend just to avoid having to carry an otherwise local noncommercial station. Cable operators need the flexibility to move a headend to meet future technical or business needs. One can easily imagine a scenario

where a cable operator has several systems clustered in an area (perhaps even crossing ADIs) and wishes to interconnect them with fiber (to improve signal quality and service reliability, for advertising sales purposes, or for entry into the alternate voice and data access business) through a central master headend. Continental is planning such a move shortly in Western Massachusetts as discussed below. Cable operators should not be disincented by a rigid FCC definition of a principal headend from creating operating efficiencies or from developing other innovative services that could benefit their customers.

For all of these reasons the FCC should permit operators absolute discretion to identify or change their principal headend. If a broadcaster has an objection to that decision on the basis that it is being done to avoid must-carry requirements, the burden should be on the broadcaster to prove that case in a dispute resolution proceeding at the FCC.

(b) The "Location" Of A Cable System For Establishing The Must-Carry Rights Of Commercial Stations

The FCC also asks for assistance in defining the "location" of a cable system for purposes of determining commercial station must-carry.[4/] The FCC asks whether the definition should be, as in the noncommercial rules, based solely on the location of

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[4/] Section 614(h)(1)(A) of the 1992 Cable Act defines a "local commercial television station" as one that is operating "within the same television market as the cable system."

the principal headend, or should the FCC take into account the entire "geographic area served by the system."[5/]

Continental believes that for purposes of determining what market or markets a cable system serves the FCC should not rigidly decide the "location" of a cable system solely based on the location of the principal headend. Rather, it should upon request consider the entire "geographic area served by the system" where that would be appropriate. Otherwise, the impact of its rules could be absurd in some cases.

For example, in our Western New England region, a planned consolidation of headends would create a principal headend in Western Massachusetts that would also serve Continental's systems in Connecticut, north of Hartford. But the Hartford ADI stops at the Connecticut/Massachusetts border. Thus, if the FCC identified a "system" based solely on the location of the principal headend, then all Hartford broadcast stations would be distant rather than local to Continental's cable systems located in the Hartford area.

(c) The Definition Of A Commercial Broadcast Station's Television Market

Under the Act the FCC has the authority to add or subtract communities from a commercial broadcast station's television market, and can determine that communities are part of more than

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[5/] NPRM at ¶ 17.

one television market.[6/] The FCC, echoing the Act, lists a number of factors that it proposes to take into account in making this determination, including: (1) whether a station was historically carried in an area; (2) the extent of a station's local news coverage, other local programming or service to the community; and (3) local viewing patterns in cable and non-cable homes.[7/]

We agree that these factors should be taken into account, particularly the latter factor, which reflects over-the-air viewability. This is critically important. It makes no sense to include a community as "local" for a broadcast station that cannot be viewed over the air in the homes of that community, at least if the reception problem is one of distance rather than interference caused by tall buildings in an urban area. One method to accomplish this in the new must-carry rules would be to restore the "significantly viewed" element of the FCC's prior must-carry rules.

Under the old "significantly viewed" rules, the Commission could find that a broadcast station was viewed by a sufficient number of households in a particular community to render the station "local" for must-carry purposes, even though the station otherwise did not fit the definition of a "local station."[8/]

[6/] See Section 614(h)(1)(C), 1992 Cable Act.

[7/] NPRM at ¶ 20.

[8/] See In the Matter of Amendment of Part 74, Cable Television Report and Order, 36 FCC2d 143, 174-176 (1972).

Continental suggests that the Commission should include such stations as "local" in expanding ADIs and also adopt the logical corollary to this approach and allow cable operators to demonstrate that certain signals are not significantly viewed in particular communities in order to exclude the communities from the station's market.

The FCC should consider other factors as well. These could include, for example:

- the overall impact on a community by an ADI decision;
- subscriber disruption, including the number of stations that would have to be dropped and added and channel positions changed as a result of the decision; and
- the cost of differing choices to both the operator and subscribers.

Presuming that a community falls within the appropriate mileage limits discussed below, the Commission's rules should also reflect a preference for placing a community in the same television market as in-state broadcast stations. For example, in one of our far northern New Hampshire systems, four towns fall in the Portland, Maine ADI because they are located in Grafton County, New Hampshire and one town, New Hampton, is in the Boston ADI. Without FCC approval New Hampshire stations will not be "local" to customers in the four Grafton County, New Hampshire towns because those stations are included in the Boston ADI. Yet these New Hampshire stations are more locally oriented to New Hampshire subscribers than the Maine stations that will have

must-carry status. The previously discussed Hartford, Connecticut situation[9/] is another graphic illustration of this problem.

These discretionary and subjective standards should, as a general matter, only apply to communities that are within a reasonable geographic area beyond the broadcast station in question. The 50 mile standard used to define a noncommercial station's carriage rights is an appropriately large area to use to limit the commercial station ADI test. The ADI limits used for must-carry should not extend beyond that, except under extraordinary circumstances. The burden of showing the need for an extension beyond 50 miles should be placed on the broadcaster requesting must-carry status.

Without such a mileage limit, the FCC will be faced with examples such as that in Continental's Galion, Ohio system. That system falls within the Columbus ADI. But one of the signals technically in the Columbus market, WWAT TV53, in Chillicothe, Ohio, is more than 100 miles away. It certainly does not serve the Galion community to treat the Chillicothe station as a "local" station.

Continental also has four systems in Ohio that fall into two different ADIs. In such cases the vast majority of subscribers may be in one ADI, and only a few in another. We propose that in such situations at least 20% of subscribers served by the cable system must fall within an ADI for it to be considered

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9/ See supra at 6.

mandatorily part of that ADI. The operator could, at its election, however, choose to consider itself in that ADI. If a system serves two ADIs in which both ADIs have at least 20% of total subscribers on the system, the operator should be able to choose in which ADI the cable system is located, or both.

Other examples of adverse inpacts from a rigid market definition, from our New England Region, include:

-- The Portsmouth, New Hampshire system serves adjacent towns in Maine. We have historically carried Boston and New Hampshire stations throughout the system and to those towns since the mid-1970s. Without flexibility in the market definition, nine of those signals will not be considered local to Eliot and Kittery, Maine and three Maine signals will no longer be considered local to Portsmouth and eight other New Hampshire seacoast towns. A similar situation prevails in the Dover, New Hampshire system, which serves Berwick and South Berwick, Maine.

-- In southeastern Massachusetts the Bristol County towns are considered part of the Providence ADI, therefore Boston signals are outside the strict ADI market definition. Continental's Easton, Massachusetts system also serves two towns in the Providence ADI and two in the Boston ADI, and our Middleboro, Massachusetts system serves two Boston ADI towns and three Providence towns. In each of these cases, these separate communities, in separate ADIs, are now served by one technically integrated system served by one headend. All of this suggests

the widespread logistical nightmares which would accompany a rigid ADI-only definition of a television market.

Section 614(h)(1)(C)(ii) of the Act provides sufficient guidelines for deciding the substance of a waiver.[10/] A petition for special relief should be used as the procedural mechanism for obtaining a waiver, as suggested by the FCC.[11/] Continental supports FCC clarification that the cable operator as well as the broadcaster will be given an opportunity to seek an individualized market determination. And the FCC should state explicitly in its rules that a community could be included in two separate ADIs where that solution better meets the Act's criteria for determining its local market.

(d) Treatment Of Regional Distant Signals

Many of the examples cited above could also, and perhaps best, be resolved by clarifying the status of regional distant signals that allows them to continue to be imported into nearby markets. The 1992 Cable Act does not recognize the substantial cable marketplace use of regional distant signals, not imported by satellite. These broadcast stations, brought by microwave or picked up off-air, fall entirely outside of the Act both for retransmission consent and must-carry purposes.

[10/] See supra n.7 and accompanying text.

[11/] NPRM at ¶ 19.

For example, in some of its systems in the Stockton, California area, which is in the Sacramento ADI, Continental carries several Bay Area broadcast network affiliate stations that are in the San Francisco ADI. When mandated, our systems black out programming that may duplicate that shown on stations located in the Sacramento market. Under the Act, these San Francisco stations are not local in the Sacramento ADI, and thus cannot assert must-carry. However, they are not distant "superstations" under the Act's definition and thus are not explicitly exempted from retransmission consent.[12/] A similar circumstance exists in our southeastern Massachusetts systems, which are in the Providence ADI but carry Boston broadcast stations today.

Section 325(b)(3)(B) of the 1992 Cable Act states that the FCC "shall require that television stations . . . make an election between" retransmission consent and must-carry. Yet these regional distant signals are not permitted to elect must-carry. Thus they should not logically have the option of electing retransmission consent.[13/] It would also make no

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[12/] See Section 325(b)(1)(D) of the 1992 Cable Act.

[13/] This interpretation is amply supported by the legislative history of the Act. For example, the Senate Report states that "each television station which has carriage and channel positioning rights under sections 614 and 615 will make an election between those rights and the right to grant retransmission authority for each local cable system." S. Rep. No. 92, 102d Cong., 1st Sess. 38 (1991) (emphasis added). Similarly, Senator Inouye stated on the Senate floor that "[t]he retransmission provisions of S.12 will permit local stations . . . to control the use of their signals" and stressed that "the FCC

(continued...)

sense for the Act to grant them the right to withhold retransmission consent in a distant market in which they are prohibited from acquiring programming rights due to the territorial exclusivity rules.[14/]

Such stations are simply not covered by the 1992 Act's must-carry/retransmission consent scheme. Thus the status quo should remain. These signals have been historically provided subscribers in both the Stockton and Providence areas, and it would clearly serve the public interest to allow Continental to bring these signals to them.

(e) Definition Of Duplicated Noncommercial And Commercial Stations

The FCC asks which noncommercial stations should be considered "substantially duplicated" and need not be carried, and whether the same standards should apply to commercial stations. Should the standard be that there is duplication if over 50% of a full week's overall programming is the same, or over 50% of the station's prime time programming?[15/]

For noncommercial stations the FCC should look at the content of a full week's programming as the standard for

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[13/](...continued)
must ensure that local stations' retransmission rights will be implemented with due concern for any impact on cable subscribers' rates." 138 Cong. Rec. S563 (daily ed. Jan. 29, 1992) (emphasis added).

[14/] See 47 C.F.R. § 73.658.

[15/] NPRM at ¶ 12.

duplication. Simultaneous programming should not be the test, but rather whether over 50 percent of the programming content is the same, whenever aired during the week. Time-shifted programs in an era of almost universal VCR penetration should be considered duplicated programming.

For commercial stations, the FCC should look at prime time programming alone, since this is the time period in which viewers and advertising revenues are most heavily concentrated. If over 50% of prime time programming is the same, stations should be considered duplicated.

2. Signal Viewability Standards For Must-Carry Signals Should Also Take Into Account Practical Concerns

The FCC notes that Section 614(b)(7) of the Act requires that all must-carry signals must be viewable on all TV receivers of subscribers connected by the operator.[16/] This presents at least two practical problems:

(a) Interference Caused By Broadcaster Channel Selection

The choice of channel position, if left completely to the broadcaster, could create signal viewability problems through co-channel interference. For example, in Continental's Newton, Massachusetts system we do not carry broadcast channels on their on-air channels because our headend is located very close to the broadcast transmitters, and to carry the stations on channel

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[16/] NPRM at ¶ 16.

would cause extremely poor visibility of these stations in subscriber homes.[17/] The broadcaster should not be permitted to force on-channel carriage to the detriment of cable subscribers. As the Commission noted last year in its Report and Order on technical standards, cable operators are not required to take extraordinary measures to improve upon signals over which they have no control.[18/] Nonetheless, the broadcaster should not be permitted the unencumbered right to create such a problem for cable subscribers. If the Commission does permit broadcasters to unilaterally create interference, the cable operator must have no liability under the Act for the consequential signal viewability problems.

(b) Tailored Channel Line-Ups For Commercial Accounts

Cable operators such as Continental often tailor specific channel line-ups for hotels, hospitals, banks or other commercial accounts, and do not necessarily carry all broadcast stations in these line-ups. For example, the cable operator could provide CNBC only to a financial institution, or a package of services to a hotel that included three network affiliates, several basic cable networks and a premium channel, without carrying other broadcast signals not desired by the hotel. The Act does not

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[17/] Local zoning restrictions in this suburban community made it impossible to locate signal reception facilities elsewhere.

[18/] Report and Order in MM Docket Nos. 91-169 and 85-38, 7 FCC Rcd 2021, 2024 (1992).

discuss, and could not have envisioned, limiting the choices of these commercial clients.

The FCC should interpret the Act to limit the meaning of "subscribers" under Section 614(b)(7) of the Act to individual subscribers, and not to commercial account subscribers. The FCC might require that such commercial accounts be offered the entire complement of must-carry signals, and to explicitly waive the right to receive some or all of these stations in writing, to be kept for inspection by the stations and/or the FCC.

3. Adverse Impacts On The Customer And The Operator Should Carry Great Weight In Channel Repositioning Disputes

(a) Channel Repositioning Disputes Should Be Resolved By The Cable Operator, But If The FCC Establishes A Priority It Should Go To The Most Recent Channel Position

Channel repositioning will be a major disruption both for cable operators and customers. The FCC should act to minimize the inevitable dislocations.

Changing channel line-up cards has to be carefully planned, with subscriber information mailed and presented on video bulletin boards, new line-ups and stickers for remotes printed and sent out, press releases provided and local franchising authorities briefed. Customer service representatives will need to be trained. This will be very costly, both financially and in terms of customer goodwill.

Subscribers also do not want to have to learn new line-ups every three years after the broadcasters negotiate

retransmission. As fiber is deployed further and headends are removed, it becomes more important to have consistent line-ups over a larger base of subscribers.

In all disputes between two or more broadcasters over channel position, the cable operator should have the ultimate choice. If there is an FCC rule that sets priorities, however, Continental supports giving first preference on channel disputes to the January 1, 1992 line-up, since this is the most recent and would avoid the most changes. Such a decision would have far less disruptive impact for consumers and mean far fewer engineering and channel lineup card changes. Subscribers would be far better served by this approach than going back to some earlier, most likely obsolete lineup. Our strong preference for priority would be the January 1, 1992 placement, then the on-air channel, then the July 1985 placement.

(b) Flexibility Should Be Allowed for Technical Problems With On-Channel Carriage

An issue of great concern to Continental, as noted above, is the ghosting and other interference caused by the proximity of broadcast transmitter towers. Our Newton, Massachusetts complex, serving approximately 55,000 subscribers in seven suburban Boston communities, falls under the television transmitters of three network affiliates and one public and one independent television station. These transmitters emit so much power in the area that the stations cannot be carried on-frequency. Significant signal

quality problems including ghosting and co-channeling would make these channels virtually unwatchable in the low band.

Our Southfield, Michigan system is located just a few miles from the VHF towers for the NBC and CBS affiliates for the Metropolitan Detroit Market. The ingress of interference on these channels is so severe that people in our Oak Park system cannot have VCRs. There should be a mechanism established by the FCC to deal with instances when certain channel positions are unusable for signal quality reasons of this type.

(c) Flexibility Should Also Be Allowed The Cable Operator In Meeting Signal Security And Other Technical Problems

The FCC should also allow the cable operator flexibility in channel positioning disputes so as to allow the operator to group broadcast and PEG channels to meet the Act's intent that we offer a basic tier composed of these signals. If the signals are scattered throughout the line-up we can only offer the minimum basic tier envisioned by the Act if we specially program a converter to permit the receipt of particular channels. For example, in the Boston ADI, if all broadcasters were carried on-channel the line-up would be 4, 5, 7, 9, 25, 38, 50, 56. Channels in between, if not scrambled, would have to be trapped and each trap or converter would have to be a special design.

Technical problems associated with channel repositioning include headend rewiring, security and scrambling difficulties, and channel mapping and logistical problems with trap installation and removal. For example, channel repositioning, as

a result of must-carry selections, may present technical and viewing problems for adjacent channels that are affected by trapping. If a broadcast station is placed adjacent to a channel that must be trapped, audio and visual problems may affect the broadcast channel. As a result, that broadcast channel could fail to meet FCC technical requirements or visual inspection requirements for carriage on the system.

Descrambling would eliminate these technical difficulties, but signal security problems for nearby premium channels would not be resolved, particularly for customers who do not want converters.[19/] For this reason, many systems use a "block" method to position pay channels in a midband and other channels in the low and high bands.

Channel repositioning also interferes with the practice of channel mapping, which is used by cable systems for reasons of signal quality and prevention of theft of cable signals. The channel mapping information is typically stored in a PROM in the subscriber's converter box, and channel repositioning may well require cable operators to pick up and re-engineer many of these boxes throughout the country. Furthermore, in nonaddressable systems, the installation and removal of traps and the resource availability of personnel and equipment to do so will be very expensive for cable system operators.

[19/] See the discussion of the Los Angeles market's severe theft of cable service problems as an example offered in Continental's comments in MM Docket No. 92-260 (Cable Home Wiring), filed December 1, 1992.